United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/980
17 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 980

Case No. 1092: BALDWIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 23 August 1999, Geoffrey L.G. Baldwin, a former staff member of the United Nations, filed an application containing pleas which read as follows:

"II. PLEAS

(a) (i) The Tribunal is requested to order the United Nations Joint Appeals Board [JAB] to let me know the numbers of the five most recent cases sent to a panel prior to mine, when they were received in the JAB office and when they were sent to a panel. The Tribunal is further requested to order the JAB to provide me a copy of the Secretary-General's original memo of 7 April 1997 and the Board's reply; and to provide me a copy of the minutes of the Panel's meeting in Executive Session on 23/3/99.

(ii) The Tribunal is requested to order the Secretary-General to provide me a list of 200 Series advisers employed in the UN HQ, with their dates of birth, separated at age sixty and over with their dates of separation, within five years prior to my separation on 30/9/96 and after, or age sixty and over and still in service.

(iii) The Tribunal is requested to declare this application uncontested should the Secretary-General fail to respond in due time, including any reasonably justified extensions, and to allow further pre-hearing pleas depending on the response of the Secretary-General.

(b) (i) The Tribunal is requested to declare the response of the Representative of the Secretary-General to my appeal to the JAB totally out of order as not being in compliance with the time limits and provisions for their extension of the Staff Regulations and Rules, and of the Rules of Procedure of the JAB, and therefore to declare all my claims uncontested.

(ii) The Tribunal is requested to declare the response of the Representative of the Secretary-General of 20 June 1997 out of order as (a) being an improper blanket denial which does not address the facts and (b) out of time limits; and therefore to declare the claims to which the Representative did not specifically respond as uncontested.

(iii) The Tribunal is requested to rescind the decision of the Secretary-General not to renew my appointment as Interregional Adviser from 1 October 1996 and to order the payment of all emoluments that would have been due had the appointment been renewed from 1 October 1996 to the actual date of renewal, with interest thereon from 1 October 1996 until paid, including specifically the month of October 1996 which I worked full time without pay.

(iv) The Tribunal is requested to order the Secretary-General to pay damages for the emotional stress of discrimination before and on separation and of unemployment after separation at least in the sum of $100,000 plus $20,000 for procedural delay.

...

(d) Should the Secretary-General decide to pay compensation instead of renewing my appointment with effect from 1 October 1996, I claim net base salary plus post allowance for New York for three years and nine months, for the period 1 October 1996 to 30 June 2000, when I will reach age 65, plus the monetary awards of the Tribunal.

(e) The Tribunal is requested to order the Secretary-General to pay such further punitive damages as it may consider appropriate."

Whereas the Respondent filed his answer on 21 January 2000;

Whereas, on 18 May 2000, the Respondent submitted additional documents;

Whereas the Applicant filed written observations on 30 May 2000;

Whereas, on 9 June 2000, the Applicant submitted supplementary observations on the Respondent's answer;

Whereas, on 12 June 2000, the Respondent filed an additional document;

Whereas the facts in the case are as follows:

The Applicant was initially appointed for a one-year period on 28 September 1987 as an Adviser in Water Resources Development, Natural Resources and Energy Division, Department of Technical Cooperation for Development in New York Headquarters, at the L-6 level under the 200 Series of the Staff Rules. His employment was subsequently extended through 30 September 1996, the date of his separation from service.

In a letter dated 28 June 1996, the Under-Secretary-General, Department for Development Support and Management Services (DDSMS), advised the Applicant that he had requested that the latter's contract be processed for an additional extension as Interregional Adviser for a period of three months, effective 1 July 1996. The letter also stated that "this will be your final extension; your contract will therefore not be renewed beyond 30 September 1996".

On 22 August 1996, in light of the expiration of the Applicant's contract on 30 September 1996, the Director, Division of Environment Management and Social Development, DDSMS, requested that the Applicant arrange for a smooth handover of his projects to other staff members, including files, status of projects, and all other relevant information to ensure against any delays. She also suggested a meeting with the other staff involved to review each project in detail.

On 23 September 1996, the Applicant responded to the Director's memorandum claiming that he had a heavy enough work load to justify a new contract well into 1997, and that the mandatory retirement rules did not apply in his case. The Applicant further stated that "[n]evertheless, I have attempted to follow your suggestion, with no success because it is unrealistic. All the water advisers are so overloaded that they cannot take on my work and they are having to consider which of their own to defer."

On 26 September 1996, the Managing Director of the Pakistan Water and Power Development Authority wrote to the Resident Representative, United Nations Development

Programme, Islamabad, requesting the retention of the Applicant for an additional six months until a project in which he was involved was completed. On the same day, the Officer-in-Charge, Natural Resources and Environment Planning and Management Branch, sent a memorandum to the Chief, Office of the Under-Secretary-General, DDSMS, advising her of the Managing Director of the Pakistan Water Development Authority's position regarding the Applicant's contract expiration, as well as expressing concern over the impact the non-renewal would have on work in progress.

On 1 October 1996, the Officer-in-Charge, DDSMS, granted the Applicant permission to remain in his office until the end of October 1996, but confirmed he would not be paid for the month.

On 29 November 1996, the Applicant requested an administrative review of the decision not to extend his appointment.

On 6 February 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 13 April 1999. Its considerations and recommendation read as follows:

> "***Considerations***
>
> 16. The Panel found no basis for Appellant's claim that there was valid reason for him to expect that his appointment would be extended. His fixed-term appointment carried no expectancy of renewal. He had been informed in writing by the head of his department that his contract would not be renewed beyond 30 September 1996. The delay in the preparation of his Personnel Payroll Clearance Action (P-35) - in part, at least, caused by him – could not have, and did not have, any effect on the date of his separation.
>
> 17. The Panel found no evidence of discrimination or prejudice on the part of the Director, DESD[N]RM [Division for Economic and Social Development and Natural Resources Management].
>
> ...
>
> ***Recommendation***
>
> 25. The Panel recommends that Appellant be paid the sum of $3,000.00 in return for a written statement that he abandons all present and future claims against the Organization.
>
> 26. The Panel makes no other recommendation with respect to [this] appeal."

On 9 August 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "...
>
> The Secretary-General has examined your case in the light of the Board's report. In respect of Case 97-14, he has taken note of the Board's findings that there was no basis for your claim that you had valid reasons to expect the renewal of your appointment and that there was no evidence of discrimination or prejudice on the part of the Director, DESD[N]RM. ... The Secretary-General accepts the Board's findings in respect of [this case] and has decided to take no further action in respect of [this part] of your appeal.
>
> ...
>
> The Secretary-General considers that the Board's recommendation to pay you $3,000 is not based on any findings of liability on the part of the Organization. In the absence of any legal liability to pay you such an amount, considerations of equal treatment make such a settlement not in the interest of the Organization. The Secretary-General cannot, therefore, accept the Board's recommendation. ...
>
> ..."

On 23 August 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's appointment was improper and discriminatory and violated the United Nations policy against age discrimination.

2. The Applicant had an expectancy of renewal due to the length of his employment, his outstanding job performance and the fact that his work in progress extended beyond the expiration of his contract.

3. The appeal process before the JAB was biased and prejudicial and did not afford the Applicant a fair hearing.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed on a series of fixed-term appointments under the 200 Series of the Staff Rules, which, by their very nature, were limited in scope and duration and expired on the date stated in the letter of appointment.

2. Above-average performance does not by itself create a legal expectancy of renewal of fixed-term appointments. The Respondent's decision not to renew the Applicant's appointment did not violate his rights.

3. Neither the 200 Series of the Staff Rules nor their application in the present case were discriminatory. The decision not to renew the Applicant's contract was not improperly motivated.

4. The Applicant did not sustain any material or moral injuries as a result of the Administration's actions, and is not entitled to compensation.

The Tribunal, having deliberated from 30 October to 17 November 2000, now pronounces the following judgement:

I. The Applicant appeals the decision of 9 August 1999, in which the Secretary-General accepted the JAB's recommendation against renewing the Applicant's fixed-term appointment. The Applicant claims that he had a legal expectancy of renewal of his fixed-term appointment; that its non-renewal was prejudicial; and, that he did not receive full and fair consideration.

II. As a fixed-term 200 Series employee, the Applicant's expectations were governed by staff rule 204.3 which provides:

> "(a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be made for service in one or more mission areas and may be for short, intermediate or long term, as defined in [staff] rule 200.2 (f);

(b) Project personnel who are initially granted appointments for less than one year but whose appointments are subsequently extended so that the total continuous contractual service is one year or more but less than five years shall be considered to be in intermediate-term status with effect from the date from which their appointment is extended or converted to immediate-term status;

(c) Project personnel in intermediate-term status who complete five years' continuous service and whose appointments are extended for at least one further year shall be considered to be in long-term status with effect from the date on which they complete five years' continuous service;

(d) A temporary appointment does not carry any expectancy of renewal."

III. The Tribunal must determine whether there was an expectancy of renewal, implicit or explicit.

The JAB considered the Applicant's argument that he had a legal expectancy of renewal. It "found no basis for [the] Appellant's claim that there was valid reason for him to expect that his appointment would be extended. His fixed-term appointment carried no expectancy of renewal."

The Applicant presents several arguments in support of his claim to renewal. The first argument is based on performance. The Applicant claims that an above average performance should create a legal expectancy of renewal of fixed-term appointments. The Tribunal does not find merit in this claim. The Tribunal has held that employment with the Organization ceases on the expiration of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even outstanding performance. (Cf. Judgements No. 427, *Raj* (1988); No. 440, *Shankar* (1989) and No. 907, *Salvia* (1998)).

IV. The Applicant argues that he worked for the Organization for nine consecutive years, which implicitly created an expectation of renewal. As to the Applicant's length of service, the Respondent argues that the Tribunal has held that a series of successive fixed-term appointments in and of itself is not enough to create an exception to staff rule 104.12 (b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any type of appointment (cf. Judgements No. 422, *Sawhney* (1988), No. 614, *Hunde* (1993) and No. 839, *Noyen* (1997)) and that this applies to staff rule 204.3 (d) as well.

The Applicant presents some persuasive arguments to the contrary. The record shows that the Applicant had worked nine consecutive years for the Organization, from 28 September 1987 until 1 October 1996. Although the Organization did not give him any explicit assurances that his assignments would lead to a contract renewal, the Applicant believed that he had such an expectancy. The Applicant argues that, based on his long history of renewals and the fact that his workload extended beyond the contract expiration date of his contract, the Organization had created an expectation of renewal.

The Respondent claims that the Applicant had no expectation of renewal as since he was employed on a series of fixed-term appointments under the 200 Series of the Staff Rules which, by their very nature, were limited in scope and duration and expired on the date stated in the letter of appointment.

The Tribunal does not accept the Respondent's position on this point. Although the Respondent may choose not to renew the Applicant's fixed-term appointment, under the 200 Series there is some precedent for discretionary departure when sufficient countervailing circumstances exist. (Cf. Judgements No. 885, *Handelsman* (1998) and No. 839, *Noyen* (1997)).

The Report of the Secretary-General on Human Resources Management to the General Assembly (A/C.5/51/34 of 22 November 1996) clearly sets forth the position of the Respondent:

> "10. ... While reaffirming that the fixed-term appointment, by its terms, does not create an expectancy of renewal, the Tribunal examines all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case - for example through a verbal or written commitment, albeit informal, made to the staff member by the programme manager that the appointment would be renewed. In addition, staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of the fixed-term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial. Finally, and even in those cases where the decision not to renew was purely discretionary, the Tribunal always gives careful attention to the issue of whether the decision was affected by lack of due process, mistake of fact, prejudice or other extraneous motives. In such cases, the Tribunal would normally award damages to the staff member whose appointment was allowed to expire, on the ground that it is an implied condition of

employment that all decisions, including a decision not to renew an appointment, are taken fairly and in the interests of the Organization."

V. In conclusion, the Tribunal finds that the failure by the Administration to renew the Applicant's contract was not tainted by discrimination. However, based on the circumstances of the case, the Applicant did have a reasonable expectancy to be considered for renewal.

VI. Accordingly, the Tribunal awards the Applicant six months net base salary which includes salary for the month of October 1996 for which the Applicant was not compensated.

VII. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant six months net base salary at the rate in effect at the time of his separation from service.

(b) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary